IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1287 1991.

Ishwar Daya Kevalram Agarwal, age 40 years, Occup. Business, residing ast Ghar No.389/2, Shaniwar Peth, Pune - 30.	]]]]	.. Petitioner (Ori. Decree holder)

Versus

Madhukar Shankar Prabhane, age 40 years, Occupation-Business, residing at Ghar No.366/1, Shaniwar Peth, Pune - 30.	]]]]	.. Respondent (Ori. Judgment debtor)

Mr. V.S. Gokhale for the petitioner.

Mr. Sanjeev J. Rairkar for the respondent.

CORAM: ANOOP V. MOHTA, J.

DATED: 12TH JULY, 2005

ORAL JUDGMENT. :

1. The petitioner-landlord, being a decree holder, moved an application under Order XX, Rule 10(1)(a) and (c) of the Code of Civil Procedure (for short "CPC") for mesne profits against the respondent-tenant/judgment debtor. The suit for recovery of the possession of the premises, let out to

the tenant, was decreed on 25th June, 1982. The Appeal No.522 of 1982, preferred by the tenant was also dismissed. Writ Petition No.946 of 1983 filed by the tenant was disposed of by order dated 18th January, 1985. The operative part of the order in Writ Petition No.3029 of 1983 is reproduced as under:

> "The Court records the statements that it is agreed between the parties that the decree passed by the Small Cause Court at Pune in Regular Civil Suit No.314 of 1980 and confirmed by the District Court of Pune in Appeal No.522 of 1982 shall not be executed before 31st October 1985 if the defendant files in this Court on or before 25th January 1985 on affidavit.
>
> 1. affirming that he is in occupation of the suit premises and no other person is in possession thereof as a licencee or a sub-tenant or in any other capacity whatsoever;
>
> 2. giving an undertaking to this Court, which undertaking shall be deemed to have been accepted after the affidavit is filed, that he will give vacant and peaceful possession of the suit premises to the plaintiff on or before 1st November 1985.
>
> 3. giving a further undertaking that he will not induct any other person in the suit premises in any capacity whatsoever.
>
> The Court directs that in case the affidavit as aforesaid is not filed on or before 25th January 1985 or in case there is a breach of the undertaking given in clause (3) above, the decree shall become executable immediately. The defendant

> will also be liable for contempt of Court or for perjury, as the case may be."

This undisputed position, as reflected above, goes to the root of the matter.

2. By order dated 31st March, 1989, the learned Small Causes Court, Pune, ordered thus:

> "It is hereby declared that the mesne profits for the period 25-6-82 to 31-10-85 will be at the rate of Rs.640/- p.m. After deducting the amount of Rs.80/- p.m. deposited by the defendant the applicant-plff. will be entitled to claim the remaining amount for the said period at the rate of Rs.560/- p.m."

3. After considering the rival contentions between the parties, the Appellate Court, however, reversed the findings by its order dated 21st April, 1990 and, thereby, quashed and set aside the order passed by the Small Causes Court.

4. The landlord, therefore, preferred the present Writ Petition, which was admitted on 18th April, 1991, in view of 1985 Mh.L.J., 80. **Ratilal Thakordas Tamakhuwala & Anr. Vs. Vithaldas Magandas Gujarathi**.

5. Heard the learned counsel Mr. V.S. Gokhale appearing for the petitioner and Mr. S.J. Rairkar appearing for the respondent. The foundation of **Ratilal** (supra) and the principle which emerges from the same has to be taken note of on the basis of facts and circumstances of the case. In the present case, the question is whether the tenant was in wrongful possession from the date of the decree till the date of eviction in question for deciding mesne profits.

6. The order passed in the Writ Petition No.3029 of 1983 clearly reflects that the parties agreed that the decree passed by the Small Causes Court, Pune, shall not be executed before 31st October, 1985, if the defendant files in the Court, an Affidavit with various conditions as referred above. Having once accepted those terms and conditions and when the same was endorsed by the Court and parties agreed and acted upon the same, it is difficult for the landlord now to again insist that the possession of the tenant at the relevant time basically from the date of the decree was unauthorised. Even though it is contended by the learned counsel appearing on behalf of the tenant that the same was a concession given by the landlord to the tenant to enjoy the premises for further more time, that

concession cannot be treated or termed as agreement between the parties to disentitled the landlord to claim mesne profits or occupation charges. The facts and circumstances of the present case and basically the above quoted order of this Court in Writ Petition No.3029 of 1983, plays a dominant role in deciding the present Writ Petition.

7. The learned counsel appearing for the respondents has relied on (2004) 5, S.C.C., 304 **Union of India Vs. Banwarilal & Sons (P) Ltd.** of the Apex Court and basically extract from paragraph 8, which reads thus:

> "8. At the outset, we may point out that there are different methods of valuation, namely, income/profit method, cost of construction method, rent method and contractors' method. In the present case, the arbitrator has applied the income/profit method. The above two issues are interconnected, as the arbitrator has assessed damages on the assumption that after 10-3-1987, the occupation and possession of the property was wrongful and illegal and in the nature of trespass. Accordingly, he has assessed damages on the footing that the respondent was entitled to mesne profits. This assumption was wrong as the appellant was given time by this Court to remain in possession up to 31-3-1993. In Rao, Kameshwara: Law of Damages & Compensation (5th Edn., Vol.I, p.528), the learned author states that right to mesne profits presupposes a wrong whereas

> a right to rent proceeds on the basis that there is a contract. But there is an intermediate class of cases in which the possession though not wrongful in the beginning assumes a wrongful character when it is unauthorisedly retained and in such cases, the owner is not entitled to claim mesne profits but only the fair rent. In the present case, in view of the permission granted by this Court enabling the appellant to use and occupy the property up to 31-3-1993, it cannot be said that the possession of the appellant was illegal and wrongful and in the nature of trespass. In the circumstances, damages were claimable not on the basis of *mesne* profits but on the basis of fair rent."

8. It has been held in **Atma Ram Properties (P) Ltd. Vs. Federal Motors (P) Ltd.** (2005) 1, S.C.C., 705 as under:

> "We are, therefore, of the opinion that the tenant having suffered a decree or order for eviction may continue his fight before the superior forum but, on the termination of the proceedings and the decree or order of eviction first passed having been maintained, the tenancy would stand terminated with effect from the date of the decree passed by the lower forum. In the case of premises governed by rent control legislation, the decree of eviction on being affirmed, would be determinative of the date of termination of tenancy and the decree of affirmation passed by the superior forum at any subsequent stage or date, would not, by reference to the doctrine of merger have the effect of postponing the date of termination of tenancy."

The Apex Court recently, in 2005 (11) 3 Jt. Today **Anderson Wright & Co. Vs. Amar Nath Roy & Ors.**, after considering the case of **Atmaram** (supra) observed as under:

> "As held by this Court in **Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd.,** once a decree for eviction has been passed, in the event of execution of decree for eviction being stayed, the appellants can be put on such reasonable terms, as would in the opinion of the appellate court reasonably compensate the decree holder for loss occasioned by delay in execution of the decree by the grant of stay in the event of the appeal being dismissed. It has also been held that with effect from the date of decree of eviction, the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises on being vacated by the tenant. While determining the quantum of the amount so receivable by the landlord, the landlord is not bound by the contractual rate of rent which was prevalent prior to the date of decree."

9. The above settled principles are basically applicable to the cases where landlord at relevant time insist for reasonable compensation for use and occupation from the date of decree of eviction or such other date. The above decisions of the Apex Court are

distinguishable and distinct on facts and circumstances of the case.

10. In the present case, there was a consent between the parties which was accepted by the Court. One cannot overlook the fact that the landlord tenant relationship is always based upon a contractual relationship. Parties can agree at any stage and such agreement cannot be discarded to claim such mesne profits in question.

11. Now, in the present case also, if parties agree and the same is endorsed by the Court enabling the tenant to use and occupy the property upto a particular period, I am also of the view that it cannot be said that the possession of the tenant was illegal and wrongful and in the nature of a trespasser.

12. The Appellate Court, while reversing the order of the Trial Court, has taken note of the principle of grant of "mesne profits" as defined under Section 2(12) of the CPC read with Order XX, Rule 10(1)(c) of the CPC. The principles considering the mesne profits has been noted above in para 8 on the basis of **Atma Ram** (supra) and **Union of India** (supra).

13. In the present case, there was no evidence led in support of the claim of a particular figure of mesne profits, as observed by the Appellate Court, and but the Trial Court has accepted the rate of Rs.640/- p.m., i.e. @ Rs.1/- per sq. foot as mesne profits. Once the occupation of the tenant was not unauthorised or not that of a trespasser and as the possession has a foundation of agreed terms and conditions as per the order of the Court, the grant of mesne profits during the period 25th June, 1982 to 31st August, 1985 @ Rs.640/- p.m. is not correct. The entitlement of the landlord during this period must be the agreed rent between the parties and in the present case Rs.80/- p.m. was the standard rate.

14. There is no dispute in the present case that while accepting the undertaking or the terms and conditions, as referred above, the landlord never insisted or claimed any particular figure or rate towards such occupation charges. In absence of any such agreement, the rate which was prevailing between the parties at the relevant date of the decree, as continued and be treated as rate of the rent. The peculiarity and circumstances of this case thus distinguishes the decision cited by the learned counsel appearing on behalf of the petitioner i.e. **Ratilal** (supra) and it is

distinct and distinguishable on facts itself. Therefore, without going into any further controversy and in view of the above reasoning, I am inclined to reject the present Writ Petition.

15. Writ Petition is dismissed. Rule is discharged. No order as to costs.

[ANOOP V. MOHTA, J.]

[srpasha@hc]